Climatrol, Inc. *and* Sheet Metal Workers International Association Local No. 33 of Northern Ohio, AFL–CIO. Cases 6–CA–28008(1–2), 6–CA–28155(1–2), and 6–CA–28327

November 2, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On April 16, 1997, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the judge's recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(1) when it threatened employees with a loss of benefits and jobs, and with closure of the business because of their union activity, interrogated them about union activity and union sympathies, and engaged in camera surveillance of the employees' union activities. He also found that the Respondent violated Section 8(a)(3) when it eliminated certain employee benefits and laid off employees Mark Newbrough and Pete Wodzinski, and Section 8(a)(3) and (4) by refusing to recall the two employees because they supported the Union and because unfair labor practice charges were filed on their behalf. The judge further found that the Respondent violated Section 8(a)(3) when it refused to recall employee Jason Scott Ware from layoff. For the reasons stated by the judge, we agree.[2] Despite the severity of these violations, however, the judge refused to issue a bargaining order. As explained below, we find that a bargaining order is necessary to remedy the foregoing violations and the additional conduct discussed below.

I. ADDITIONAL 8(a)(1) AND (3) FINDINGS

In sections III, E and F of his decision, the judge found that the Respondent's president, Jim Garner, told employees Wodzinski and George (Mike) McCormick on or about March 19, 1996,[3] that the Respondent had "plenty" of work that it could do but would not do it until the employees' "attitudes" changed.[4] The judge further found that on March 29, the Respondent's vice president, Rod Garner, Jim Garner's son, told McCormick that the Respondent had work it could do, but was not going to do it until the Respondent saw what would happen with the Union. Additionally, Wodzinski, whom the judge credited overall, testified that on March 20, he asked Jim Garner why the employees' "hours were getting shorter," and that Garner replied that "nothing was going to change until the attitudes changed." Notwithstanding his factual findings, the judge failed to conclude that this conduct violated the Act. We find that these comments, made during the period that a significant segment of the Respondent's small work force was on layoff, violated Section 8(a)(1) because they unlawfully conveyed that work opportunities had been, and would continue to be, reduced as long as employees supported the Union.[5]

We also find that the Respondent, in fact, reduced or diverted work opportunities for the employees and thereby violated Section 8(a)(3) and (1) of the Act. The Garners' unlawful remarks, supra, evidence both that work opportunities existed and that employees' hours were being shortened. The record further establishes that on March 25, the day the Union demanded recognition from the Respondent and filed unfair labor practice charges on behalf of discriminatees Wodzinski and Newbrough, Jim Garner complained to Union Agents Kenneth Perdue and Matthew Oakes that he was having trouble finding qualified help. He told Perdue and Oakes, however, that he would not rehire Wodzinski and Newbrough because the Union filed charges with the Board. Ruing the lack of qualified employees makes little sense unless work opportunities existed. Moreover, Wodzinski testified that on March 20, Rod Garner said that the Respondent was so busy it "sent work out" to another company to perform. Significantly, in its brief in support of exceptions, the Respondent does not deny reducing work, but argues rather that it "had the right to correct attitude problems." In these circumstances, we find that the Respondent unlawfully reduced and diverted

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt the judge's findings that employees Ware and Paul Williams were laid off lawfully in January 1996 and that Williams was lawfully refused recall.

[3] Except where specifically stated, all dates are in 1996.

[4] The judge found, and it is readily apparent by this comment and others, that the Garners' use of the word "attitude" is a veiled reference to the employees' union activity. See *Promenade Garage Corp.*, 314 NLRB 172, 179–180 (1994) (reference to employee's "work attitude" as ground for discharge a euphemism for prounion sentiments); *Cook Family Foods*, 311 NLRB 1299, 1319 (1993) (company manager's reference to employee's "bad attitude" deemed, in context, to be a reference to union activities); *McCotter Motors Co.*, 291 NLRB 764, 771 (1988) (manager told employee she had "bad attitude" after she voiced grievances on behalf of other employees; deemed evidence of unlawful motive in her subsequent discharge). See also *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 400 (4th Cir. 1991) (in upholding Board's unlawful discharge finding, court noted that employer's accusation that employee had "defiantly negative attitude" referred to employee's attitude towards employer's previous antiunion retaliation).

[5] Three of seven employees were on layoff. Ware was lawfully laid off in January, but, as noted above, unlawfully denied reinstatement in March. Employees Mark Newbrough and Wodzinski were laid off on March 18 and 20, respectively.

work opportunities for its employees because they supported the Union.[6]

II. THE BARGAINING ORDER

A. The Unit

The judge discussed but did not make specific findings regarding the appropriateness of the unit. The Respondent is engaged in the sales, installation, and service of heating, ventilaling and air-conditioning (HVAC) equipment at construction sites, and the employees involved in the instant matter perform installation and service work. The amended consolidated complaint alleges that the appropriate unit for the purposes of collective bargaining is "all full-time and regular part-time utility workers, apprentices, journeymen sheet metal workers and working foremen employed by the Respondent from its Clarksburg, West Virginia, facility at various construction job sites in the State of West Virginia; excluding all other employees, office clerical employees, salesmen and guards." Although the Respondent denied this allegation in its answer, it did not otherwise litigate the description or composition of the unit. As the judge noted, the General Counsel established that at relevant times the Respondent employed two installers, two to three helpers, two service repairmen, and one shopman. The General Counsel further established that the installers, helpers, and servicemen generally work together in two-man or three-man crews at various jobsites, and that they frequently interact with the shopman, fabricating metalwork in the shop. The installers, helpers, servicemen, and shopman are supervised by the Garners. They have the same hours, similar wages, and common benefits. Since it is not disputed that the job classifications used by the Respondent fall within the above unit description or that the employees in issue share a community of interest, we find that the unit described in the amended consolidate complaint is appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

B. Majority Status

The Union demanded recognition from the Respondent on March 25. On that date, the unit numbered seven employees, of whom five had signed cards authorizing the Union to represent them for purposes of collective bargaining.[7] It is therefore clear that the Union had majority status at the time of its demand.

C. The Severity of the Violations

The judge declined to issue a bargaining order in this case. He noted that two original unit employees were gone: McCormick who voluntarily resigned in May, and Williams. The judge found that although the Respondent committed "serious hallmark violations," the reinstatement of the discriminatees Newbrough, Wodzinski, and Ware pursuant to the recommended Order made it likely that a fair election could be conducted among the Respondent's employees. We disagree.

The Board will issue a bargaining order, absent an election, in two categories of cases. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive unfair labor practices which nonetheless have a tendency to undermine majority strength and impede election processes." In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and employee sentiments once expressed by authorization cards would, on balance, be better protected by a bargaining order*." NLRB v. Gissel Packing Co.*, supra at 613, 614–615; *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), enfd. 152 F.3d 917 (2d Cir. 1998), cert. denied 525 U.S. 983 (1998).

We find that the violations at issue in the instant case constitute category I conduct within the meaning of *Gissel*. The Respondent embarked on a series of pervasive and increasingly coercive unfair labor practices within weeks of the advent of the employees' union activity. The first union contact with employees occurred on October 24 and by late November 1995, a majority of the unit employees had signed authorization cards. On December 6, 1995, the Garners conducted a mandatory meeting of employees at which they announced that the Respondent had its best year ever with gross profits exceeding a preset goal of $1 million, but they sharply admonished employees for "attitude problems"[8] and threatened to take away vacations and holiday benefits. Rod Garner said that the Respondent might as well be "a un-

[6] The record identifies one company to which work was diverted. We shall leave to compliance the determination of how much work was turned away and what employees would have earned had the Respondent accepted such work. We shall also direct the Respondent to cease its discriminatory reduction and diversion of work and to restore the status quo by accepting available work on the same basis that it did prior to its unlawful conduct. See *Associated Constructors*, 325 NLRB 998 (1998), and *A-1 Fire Protection*, 273 NLRB 964 (1984).

[7] At the time the organizing drive began, there were eight employees in the unit: Williams, Ware, Newbrough, Wodzinski, McCormick, Gary Butcher, William Jones, and Kenny Willis. The lawful layoff and failure to recall Williams, who signed a union authorization card in October 1995, reduced the unit to seven employees. Three of these seven employees (Butcher, Newbrough, and Wodzinski) also signed cards in October 1995, and McCormick signed a card in November 1995. Ware signed a card in February while on layoff.

[8] See fn. 3 above.

ion shop" if it was going to pay benefits. Additionally, Jim Garner threatened employees with loss of work and jobs and threatened that he would close the business before he would "go union." Within 1 month, in January 1996, the Respondent made good on one of its threats by terminating the employees' 1 week paid vacation and five paid holidays. The Respondent then acted on the other threats it had made. On March 18 and 20 the Respondent unlawfully laid off Newbrough and Wodzinski, respectively. Wodzinski's layoff occurred 1 day after a union meeting to discuss the Respondent's possible failure to pay appropriate wages at a Federal jobsite and a day after Wodzinski asked Jim Garner why benefits had been cut in such a profitable year. As noted in the previous section, Garner replied that benefits could be reinstated if the employees' attitude improved. Garner also said there was work it could do but would not until the employees' attitude changed. The Respondent in fact reduced and diverted work opportunities, and never recalled Newbrough, Wodzinski, and Ware.

In sum, the Respondent threatened employees with a loss of economic benefits, jobs, and closure, and then eliminated those benefits along with the jobs of three employees and reduced work opportunities because of the employees' union activity. Not one of the unit employees escaped the Garners' wrath. All of the employees were threatened with and, in fact experienced, loss of benefits. All of them were threatened with job loss, and three of seven employees were permanently laid off. The retaliatory decimation of the unit through the layoffs eviscerates the rights guaranteed by the Act, and is hardly less coercive than termination of an entire work force,[9] given that the Respondent made it clear that the layoffs would last as long the employees' prounion support did.

Moreover, the Respondent showed no signs of abating its unlawful course of conduct even after ridding itself of union supporters. When confronted with the initial unfair labor practice charges in this case, Jim Garner said he would not recall Newbrough and Wodzinski because of the charges, a violation of Section 8(a)(4). The Respondent took further steps to keep its work force free of union supporters. Thus, Rod Garner unlawfully interrogated and threatened Edward Jay Lane in May prior to hiring him when he asked about Lane's union sympathies and advised Lane that the Respondent would shut down "if a union came in." Thereafter, on two occasions in June, the Respondent engaged in unlawful surveillance of its employees at a jobsite and at its facility.

In view of all of the foregoing, we find that the Respondent's intimidating course of conduct places it in the realm of those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, because traditional remedies cannot erase the coercive affects of the conduct, making the holding of a fair election impossible. See *Cassis Management Corp*., 323 NLRB at 459. The restorative effect that Board-ordered reinstatement may have on unit employees is severely diminished by the fact that all of the current employees were victims of these enduring unfair labor practices and the fact that the perpetrators of the unfair labor practices, Jim and Rod Garner, remain the owners and operators of the Respondent. It is highly improbable that the employees who retained their jobs and the discriminatees who are entitled to reinstatement will risk further retaliation by supporting the union. Accordingly, we find that a bargaining order is necessary under category I standards.

Even if we were to find, however, that the violations are less than "outrageous," a bargaining order is warranted under category II standards. At best, the elimination of benefits, the discharge of more than one-third of the unit in fulfillment of threats of job loss, and the diversion of unit work, along with the subsequent interrogation and threat of job loss made to a new employee render the possibility of a fair election extremely remote. Threats of business closure and job loss have long been held to be "hallmark" violations of the Act. *Gerig's Dump Trucking*, 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998); *Laser Tool, Inc.*, 320 NLRB 105 fn. 2 (1995); *Koon's Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988). The actual loss of employment owing to discrimination clearly is a hallmark violation. *Adam Wholesalers*, 322 NLRB 313, 314 (1996), citing *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941). Similarly, the retaliatory elimination of benefits is a patently coercive unfair labor practice. In these circumstances, the possibility that employees would hereafter express their uncoerced desires through the mechanism of an election is slight, if it exists at all.

Finally, we note that the instant case differs markedly from *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997), in which the court declined to enforce a bargaining order issued by the Board. Unlike that case, the spate of egregious unfair labor practices here affects every member of the small, single-location unit, the Union unquestionably commands majority support, and turnover within the unit as it was originally constituted is marginal.[10] Further, in our view, a justifiable rather than an inordinate amount of time has elapsed for the processing and litigation of this case to date and for our issuance of a bargaining order. See *America's Best Quality Coatings Corp.*, 44 F.3d 516, 522 (7th Cir. 1995), in which the

[9] See, for example, *Cassis Management Corp*., supra, and cases cited therein.

[10] Although the Respondent hired six new employees from April 24 through June 12, these hires were the direct result of the Respondent's unlawful refusal to recall Newbrough and Wodzinski, as well as Ware. In addition, the Respondent must, pursuant to our Order, reinstate these three employees, with the result that the seven-person unit will consist of four of the original card signers.

court found that the passage of 3 to 4 years from date of unfair labor practices to the issuance of the bargaining order was an "ordinary institutional time lapse inherent in the legal process."

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union. Having found that the Union demanded recognition on March 25, that at the time of its demand it represented a majority of the Respondent's employees, and that the Respondent's unfair labor practice conduct warrants the issuance of a bargaining order under the *Gissel Packing* standards discussed above, we find that the Respondent violated Section 8(a)(5) and (1), as alleged. In view of the fact that the Respondent embarked on its course of unlawful conduct on December 6, when it threatened employees with a loss of benefits and jobs and business closure, and that the Union had acquired majority status at the time, we find that the Respondent's obligation to recognize and bargain with the Union began on the date. *Peaker Run Coal Co*., 228 NLRB 93 (1977). Accord: *Ellis Electric*, 315 NLRB 1187 (1994).

AMENDED CONCLUSIONS OF LAW

1. Climatrol, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers International Association Local Union No. 33 of Northern Ohio, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent on March 18 and 20, 1996, violated Section 8(a)(3) and (1) of the Act when it laid off Mark Newbrough and Pete Wodzinski because of their support for he Union and since mid-March 1996 when it failed to recall Jason Scott Ware from layoff.

4. The Respondent since March 25, 1996, violated Section 8(a)(4) and (1) of the Act when it failed to recall Mark Newbrough and Pete Wodzinski because charges had been filed on their behalf with the Board.

5. The Respondent on March 29 violated Section 8(a)(1) by informing an employee that it was reducing work opportunities for employees because of their union activities, and thereafter, violated Section 8(a)(3) and (1) of the Act by reducing and diverting such work opportunities.

6. The Respondent violated Section 8(a)(1) of the Act when it threatened to terminate the employment of its employees before it would recognize a union as collective-bargaining representative of its employees.

7. The Respondent violated Section 8(a)(1) of the Act when it threatened to terminate benefits because of pro-union activity by its employees and violated Section 8(a)(3) and (1) of the Act when in January 1996 it terminated vacation pay and holiday pay for its employees.

8. The Respondent violated Section 8(a)(1) when it unlawfully interrogated employees about the Union.

9. The Respondent violated Section 8(a)(1) of the Act when it unlawfully surveilled and photographed the protected concerted activities of its employees.

10. The following unit is appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time utility workers, apprentices, journeymen sheet metal workers and working foremen employed by the Respondent from its Clarksburg, West Virginia, facility at various construction job sites in the State of West Virginia; excluding all other employees, office clerical employees, salesmen and guards.

11. Since on or about March 25, 1996, and at all times thereafter, the Union has represented a majority of the employees in the above-described unit, and has been the exclusive representative of these employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

12. By failing and refusing to recognize and bargain collectively with the Union since March 25, 1996, the Respondent has violated Section 8(a)(5) and (1) of the Act.

13. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Climatrol, Inc., Clarksburg, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or failing to recall from layoff employees because of their union activity or because charges have been filed with the Board on their behalf.

(b) Threatening to reduce, and reducing and diverting, work opportunities for employees because of their union activities.

(c) Interrogating any employee about union support or union activities.

(d) Threatening employees that it will shut down before it lets a union in.

(e) Threatening to eliminate or eliminating employee benefits because of employee support for the Union.

(f) Surveilling and photographing employees engaged in protected concerted activity.

(g) Refusing to recognize and, on request, bargain with Sheet Metal Workers International Association Local No. 33 of Northern Ohio, AFL–CIO as the collective-bargaining representative of employees in the appropriate unit.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order reinstate consistent with the remedy section of the judge's decision, Mark Newbrough, Pete Wodzinski, and Jason Scott Ware to their former positions or, if those jobs no longer exist, to substantially equivalent positions.

(b) Make Mark Newbrough, Pete Wodzinski, and Jason Scott Ware whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay is to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the layoff of Mark Newbrough, Pete Wodzinski, and Jason Scott Ware and notify them in writing that this has been done and that evidence of the unlawful layoff and/or failure to recall will not be used against them.

(d) Within 14 days of the date of this Order, reinstate retroactive to January 1996 the holiday pay and vacation benefits enjoyed by employees prior to January 1996 and reimburse employees for any moneys lost as a result of the unlawful elimination of these benefits, with interest.

(e) Within 14 days of the date of this Order, restore the status quo by accepting available work on the same basis that work was accepted prior to the unlawful reduction and diversion of work opportunities, and make employees whole for any loss of earnings and other benefits suffered as a result of the reduction and diversion of work opportunities.

(f) Recognize and, on request, bargain with Sheet Metal Workers International Association Local No. 33 of Northern Ohio, AFL–CIO as the collective-bargaining representative of employees in the appropriate unit.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Clarksburg, West Virginia, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 6, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off employees or refuse to recall them because they support the Union, and WE WILL NOT refuse to recall employees from layoff because charges have been filed on their behalf with the Board.

WE WILL NOT threaten to go out of business if employees select a union to represent them.

WE WILL NOT threaten to reduce work opportunities for employees or divert such opportunities because of their support for the Union.

WE WILL NOT interfere with employees' protected concerted activities by taking pictures of them without proper justification when they are engaged in protected concerted activity.

WE WILL NOT interrogate our employees about their union sympathies.

WE WILL NOT threaten to eliminate or eliminate benefits if our employees engage in protected concerted activity.

WE WILL NOT refuse to recognize and, on request, bargain with Sheet Metal Workers International Association Local No. 33 of Northern Ohio, AFL–CIO as the collective-bargaining representative of employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer reinstatement to Mark Newbrough, Peter Wodzinski, and Jason Scott Ware, to their former positions or, if the positions no longer exist, to substantially equivalent positions, and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

WE WILL return to the past practice of accepting available work on the same basis that we did prior to our discriminatory reduction and diversion of work, and WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the reduction and diversion of work opportunities.

WE WILL remove from our files any reference to the unlawful layoffs or failure to recall from layoff Mark Newbrough, Pete Wodzinski, and Jason Scott Ware, and notify each of them in writing that this has been done and that their unlawful layoff and failure to be recalled from layoff will not be used against them in any way.

WE WILL reinstate retroactive to January 1996 the holiday pay and vacation benefits of our employees and make them whole for any moneys they lost as a result of the elimination of these benefits in January 1996, with interest.

WE WILL recognize and, on request, bargain with Sheet Metal Workers International Association Local No. 33 of Northern Ohio, AFL–CIO as the collective-bargaining representative of employees in the appropriate unit.

CLIMATROL, INC.

Gerald McKinney, Esq., for the General Counsel.
Fred Holroyd, Esq., of Charleston, West Virginia, for the Respondent.
Richard P. James, Esq., of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. Between March 25 and September 3, 1996, charges and first amended charges were filed in Cases 6–CA–28008–1, 6–CA–28008–2, 6–CA–28155–1, 6–CA–28155–2, and 6–CA–28327 by Sheet Metal Workers International Association Local Union No. 33 of Northern Ohio, AFL–CIO (the Union) against Climatrol, Inc. (the Respondent).

On September 4, 1996, the National Labor Relations Board, by the Regional Director for Region 6, issued an amended consolidated complaint (the complaint) which was further amended at the hearing, which alleges that Respondent violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act) when it unlawfully committed numerous unfair labor practices, to include the unlawful termination of four employees, in order to defeat a union campaign to organize its employees. Among the remedies sought by the General Counsel is the issuance of a bargaining order under the authority of *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), which bargaining order would direct Respondent to recognize the Union and bargain with it as the collective-bargaining representative of its employees. The General Counsel contends a *Gissel* bargaining order is appropriate because Respondent's unfair labor practices were so egregious that it has made the holding of a fair election impossible.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Clarksburg and Fairmont, West Virginia, on October 17 and 18 and December 2 and 3, 1996.

Upon the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and upon by observation of the demeanor of the witnesses I issue the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a West Virginia corporation, with an office and place of business in Clarksburg, West Virginia, has been a contractor in the construction industry engaged in the retail sale and the nonretail installation and service of heating, ventilating, and air-conditioning equipment (HVAC).

Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

A unit appropriate for purposes of collective bargaining under Section 9(b) of the Act would be a unit of Respondent's employees who did the following jobs: installers of HVAC equipment, helpers who are assigned to assist the installers, service repairmen who service the installed HVAC equipment, and the shopman who gets the material together that the others need to do their job. All of the people who did this work for Respondent were hourly employees who wore the same type of uniform and had the same benefits package, i.e., health insurance, vacation, paid holidays, and could participate in a 401(K) plan.

In the fall of 1995 this unit had two installers, Mark Newbrough and Pete Wodzinski, three helpers Jason Scott Ware, Paul Williams, and Gary Butcher, two service repairmen, Bill Jones and George (Mike) McCormack, and one shopman, Kenny Willis, for a total of eight employees. Respondent did not contest during the hearing or in its posthearing brief that this was an appropriate unit under Section 9(b) of the Act but merely denied in its answer that the unit was appropriate.

The Union began an organizing campaign among these employees in the fall of 1995. Within a few months four of the eight or 50 percent of the employees in the unit no longer worked for Respondent. Six of the eight had signed union authorization cards and all of the employees so terminated from Respondent's employ had signed union authorization cards.

Jim Garner and his son, Rod Garner, are president and vice president, respectively, of Respondent, and they claim that they did not know of any union organizing activity by any of their employees until after they had let go of the four discriminatees in this case. The four discriminatees are Paul Williams (a helper), Jason Scott Ware (a helper), Mark Newbrough (an installer), and Pete Wodzinski (an installer). Respondent claims that Williams and Ware were let go in January 1996 because of lack of work and that Newbrough and Wodzinski quit in March 1996.

The union campaign began when organizer Suzanne Morgan contacted installer Mark Newbrough and his helper, Gary Butcher, at one of Respondent's jobsites on October 24, 1995. They both signed union authorization cards. Two days later, on October 26, 1995, Morgan, at a Hardees Restaurant, talked to installer Peter Wodzinski and his helper Paul Williams and both Wodzinski and Williams signed union authorization cards at that time. As Union Organizer Suzanne Morgan was leaving the Hardees' parking lot Jim Garner pulled in. On November 29, 1995, service repairman George (Mike) McCormack signed a union authorization card at a jobsite and on February 28, 1996, at the union hall Jason Scott Ware signed a union authorization card. All the union authorization cards designated the Union as the collective-bargaining representative of the person signing the card.

The building where Respondent is housed is such that employee conversations about the Union or anything else for that matter could be heard by Jim and Rod Garner in their offices which directly abut the shop.

In its brief Respondent argues that these union authorization cards were signed after the termination of four of the employees who signed union authorization cards in order to give the employees a better case against Respondent. There is no evidence to support this claim and I credit the testimony, which is corroborated by the dated cards, of Mark Newbrough, Jason Scott Ware, Pete Wodzinski, Paul Williams, George (Mike) McCormack, and Suzanne Morgan that the cards were signed on the date noted on the union authorization card. Gary Butcher who was still employed by Respondent at the time of the hearing and who signed a union authorization card was not called as a witness by either side.

Both Mark Newbrough and Pete Wodzinski approached shopman Kenny Willis and asked him to sign a union authorization card but he told them he was not interested. Willis still works for Respondent but did not testify before me.

On December 6, 1995, a mandatory employee meeting took place at Respondent's facility. The purported reason for the meeting was a discussion of the employee 401(K) plan. During this meeting according to the testimony of Mark Newbrough, Jason Scott Ware, Pete Wodzinski, and George (Mike) McCormack, the Union came up in discussion and statements were made by Jim Garner that violate the Act. Jim Garner, his son, Rod Garner, and Sharon Simon, officer manager, and a statutory supervisor, deny that the Union was mentioned and deny that Jim Garner made the statements attributed to him by Newbrough, Ware, Wodzinski, and McCormack. In Simon's nonverbatim summarized minutes of the meeting there is no mention of the Union.

As to what was said at this meeting, I credit the version presented by the testimony of Newbrough, Ware, Wodzinski, and McCormack over the version present by the Garners and Simon. It could be argued that since Newbrough, Ware, and Wodzinski are alleged discriminatees they may have a motive to fabricate but they nevertheless impressed me, each of them, as honest. The Garners and Simon did not so impress me. And, of course, the Garners and Simon have arguably a motive to fabricate as well. But George (Mike) McCormack has no motive to fabricate. McCormack no longer works for Respondent. He resigned in May 1996 and moved to Tulsa, Oklahoma, where he is a licensed contractor with his own HVAC business. He appeared before me as a subpoenaed witness who, by his demeanor, obviously did not relish being a witness. I found him very credible.

At the December 6, 1995 meeting at Respondent's facility Jim Garner, according to McCormack, Newbrough, Ware, and Wodzinski, told his employees that Respondent had had one of its best years ever in 1995 and had grossed close to a $1 million in business but there was some attitude problems he didn't like and he was thinking of taking away vacation and holiday benefits and compensating employees in some other fashion based more directly on quality of performance. Rod Garner, Jim's son, then said if Respondent was going to be providing benefits it may as well be union. Jim Garner then responded that before he would go union he would lay off the employees and he and his son would strap on belts and do the work themselves. Jim Garner also said he had worked union before and would never do it again and he would close the business before he would go union.

This mention of the Union at the December 6, 1995 mandatory meeting of employees, where it is Respondent's officials, Jim and Rod Garner, who first bring up the subject of the Union demonstrates that Respondent was aware of some union activity on the part of some of its employees in December 1995 and prior to the layoff/discharge of the four discriminatees. In addition, I credit the testimony of Edward Jay Lane that when he interviewed with Jim Garner in May 1996 Garner told Lane that Respondent had been having a problem with the Union since the prior October but it really came out in the open a few months ago, a probable reference to the union demand for recognition on March 25, 1996. The statements of Jim Garner that he would close the business before he went union and that he would lay off the employees and he and his son would do the work themselves before he would go union are unlawful threats in violation of Section 8(a)(1), of the Act. In addition the threat to eliminate vacation and holiday pay because of poor "attitude" after Respondent just had its best year can only be interpreted as a threat of loss of benefits because of union activity.

In January 1996, Respondent terminated, as threatened in December 1995, the following benefits for all his employees, i.e., 1-week paid vacations and pay for five holidays. These benefits were terminated, I find, because of the union activity of Respondent's employees, because having just had in 1995 the most successful year in Respondent's history to then take away benefits makes no sense whatsoever except as retaliation for protected concerted activity. The termination of these benefits was done in violation of Section 8(a)(1) and (3) of the Act.

The Garners claim that the benefits weren't really terminated but will be paid in another way, e.g., a lump sum, however,

they have not been paid in any other manner as of the close of the hearing before me on December 3, 1996.

B. Layoff/Discharge of Paul Williams

Paul Williams started his employment with Respondent in April 1995 and was laid off in January 1996, some 9 months later. He was a helper and signed a union authorization card along with Pete Wodzinski on October 26, 1995.

Williams talked about the Union in the shop with the other employees who signed union authorization cards. He was sick and as a result not present at the December 6, 1995 meeting where the Union was mentioned and Jim Garner threatened to close the business before he would go union. Williams testified that he tried to keep knowledge of his union activity away from the Garners.

Williams had a blood disorder and missed a good deal of work as a result thereof.

Under the rationale of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), which I consider in deciding the lawfulness of all the terminations in this case, if, after the General Counsel presents a prima facie case of discrimination, the Respondent has an opportunity to rebut the General Counsel's case by establishing it had legal and nondiscriminatory reasons for the layoff or failure to recall or discharge in question.

Rod Garner testified, largely corroborated by Williams himself, that Williams had a serious attendance problem. Granted Williams was ill, which is a good excuse or reason for missing work, but he missed 77 out of 180 days of work. In addition, Williams was told he should take an EPA test but didn't because he claimed he couldn't afford it and didn't know that Respondent had prepaid for him to take the test. After Williams told Jim Garner in November 1995 that he didn't taken the test Jim Garner told him to take it as soon as he could but Williams hadn't taken the test by the time he was laid off on January 6, 1996.

Respondent claims that work was a slow in early 1996 and when Williams called in for work he was told he wasn't needed. By the time Respondent hired new helpers (Williams had been a helper) Respondent didn't recall Williams because of his bad attendance and because he hadn't taken the EPA test. I find that Respondent presented a sufficient economic business justification for its layoff and failure to recall Paul Williams and that the layoff and failure to recall Williams was not a violation of the Act.

C. Layoff/Discharge of Jason Scott Ware

Jason Scott Ware began employment with Respondent in August 1995 as a warehousemen and became a helper in December 1995. He was laid off on January 15, 1996. He worked for Respondent for approximately 5 months. Ware did not sign a union authorization card until February 28, 1996, approximately 1-1/2 months after his layoff.

In January 1996 Ware, who lived in the country, was snowed in. He called in and was told by management that if you can't get in, you can't get in. Eventually after several days, Ware was told he was being put on layoff status and Respondent would call him when they needed him.

Respondent never called him back and when he called he was told they didn't need him. Eventually Ware stopped calling in for work.

Respondent's reason for the layoff of Ware was that work was slow and the reason for not recalling Ware when work picked up was that Ware had not been working out as an employee. Their evidence that Ware was not working out as an employee were that Peter Wodzinski, who Ware helped, told management that Ware was not working out as a employee and that Ware had dropped and broken a drill belonging to Wodzinski. Wodzinski credibly testified that he never told Respondent that Ware was not working out but simply that Ware wasn't ready to become an installer quite yet. Ware admits he broke Wodzinski's drill accidentally when he moved a ladder. However, there is compelling evidence that Ware was working out okay as an employee. Ware was hired under a West Virginia program whereby the State paid part of Ware's wages in return for Ware being trained. Pursuant to the state program Ware was rated by Respondent on attendance, dependability, attitude, and training progress on a monthly basis and could be rated on the forms provided either satisfactory or unsatisfactory. Ware was rated satisfactory in all areas every month except once when rated unsatisfactory in September 1995 for attendance and Respondent noted on the form that Ware had car problems that month.

Considering all the evidence I find that Respondent did not violate the Act when it laid off Ware because I credit Respondent that work was slow in January 1996. However, by mid-March 1996 Respondent had work it could do but wasn't because it did not like the attitude of its employees. I credit Peter Wodzinski and George (Mike) McCormack that Respondent told them this. Accordingly, Ware could have been recalled in March 1996 but was not. Based on all the evidence in this case Ware I find was not recalled because of his activity on behalf of the union. By mid-March Ware had signed a union authorization card. The failure to recall Ware by mid-March 1996 was a violation of Section 8(a)(1) and (3) of the Act.

D. Layoff/Discharge of Mark Newbrough

Mark Newbrough began his employment with Respondent in November 1993 and his employment terminated on March 18, 1996.

The General Counsel maintains that Newbrough was fired for union activity. Respondent maintains that be quit his employment. I agree with the General Counsel.

Newbrough was an installer and he and his helper, Gary Butcher, were the first to sign union authorization cards on October 24, 1995. Butcher was not laid off or discharged and did not testify before me.

Newbrough and his fellow employees discussed the Union at the shop under conditions where it was quite possible for Jim and Rod Garner to hear the men discuss the Union. The General Counsel's witnesses were honest and could easily have said, if they were inclined to lie to help their case, that Jim and Rod Garner had heard them talk union but they didn't say that. However, the set up of the shop was such that the Garners whose offices abutted the work area could easily have heard the employees discussing the Union. However, whether the Garners learned about the union activity because they overheard it or from some other source it is clear they knew of the union activity by December 6, 1995, when they had the employee meeting at the shop. I rely in part on the so-called "small shop doctrine" in finding the Respondent knew of the union activity among its employees. See *American Chain Link Fence Co*., 255 NLRB 692, 693 (1981).

As noted above, Jim Garner said he was thinking of taking away holiday pay and vacation benefits from his employees

even though the Company had just had its best year ever, and when his son Rod Garner commented that with all those benefits maybe Respondent should be union, Jim went on to say that he would close before he went union and he and his son would strap on belts and do the work themselves. As noted above and reiterated here, Respondent, I find, knew of union activity among its employees at the time of the December 6, 1995 meeting of the employees. I note also that I credit Edward Jay Lane who testified that in May 1996 that Jim Garner told him that Respondent had been having a problem with the union since the prior October.

Newbrough in January 1996 distributed union literature at work.

In February 1996 at a union meeting at the union hall there was a discussion between the union organizer and some of Respondent's employees about whether Respondent complied with the overtime rules and prevailing wage rate on a recent project it worked on at a Veterans Administration (VA) Hospital and the employees were informed by the Union that they should collect their pay stubs and that there would be a meeting on this matter and the employees may be entitled to moneys from Respondent because of Respondent's possible failure to comply with applicable overtime pay rules and/or its possible failure to pay the prevailing wage rate on a federally funded project.

On March 13, 1996, the Union mailed a flyer to the homes of the six employees of Respondent who had signed union authorization cards stating that there would be a union meeting at 5 p.m. on March 19, 1996. The subject of the meeting was to be the issues of employees receiving back wages for all times not paid at time and a half over 40 hours and to see if the prevailing wage rate had been paid. Employees were told to bring their paystubs to the meeting and were informed that "[t]his could be worth thousands of dollars to you." There is no direct evidence that this flyer fell into the hands of the Garners or that its contents became known to them although Newbrough did take a copy of the flyer to work. However, the timing between the distribution of this flyer and the fate of Ware, Newbrough, and Wodzinski is telling. Needless to say any "thousands of dollars" paid to employees would be paid by Respondent.

Suffice it to say on March 18, 1996, Newbrough was laid off. As to what occurred between Newbrough and the Garners I credit Newbrough. I found him to be a very credible witness.

To begin with the Garners, father and son, concede that Newbrough was very good at his job. However, on March 18, 1996, Jim and Rod Garner met with Newbrough and told him they didn't like Newbrough's attitude about a new rule prohibiting smoking in company vehicles.[1] Jim Garner told Newbrough that he was a good worker and the other employees looked up to him as a leader but he wasn't a company man and maybe he shouldn't continue to work for Respondent. Jim Garner went on to tell Newbrough that Peter Wodzinski was one of the best at what he did for a living but even Wodzinski could be replaced and that work would be slow for a week or two and Newbrough should go home and they'd call him if they needed him.

Newbrough could see the handwriting on the wall. Newbrough then said to Jim Garner why drag it out if Respondent was going to lay him off just do it so he could begin collecting unemployment.

On May 2, 1996, Newbrough delivered a letter to Respondent in which he stated that he was still available for work and had been since March 18, 1996, and was anxious to return to work. He was never brought back to work

Respondent claims that they told Newbrough that his attitude was bad and maybe he shouldn't work for them and they gave him a week to decide what to do. When Newbrough turned in his uniform they understood this to mean he was quitting.

It is clear to me as noted above that Respondent knew of union activity among its employees prior to December 6, 1995. It also seems apparent that Respondent learned about the March 19, 1996 meeting concerning Respondent's possible failure to pay overtime and prevailing wage rate on a federally funded job and decided to terminate Mark Newbrough, one of the first employees to sign a union authorization card and someone the other employees looked up to as a leader. Newbrough had discussed the union with his fellow employees and it is clear that everyone in the eight person unit knew of the union activity. Accordingly, the layoff/discharge of Mark Newbrough on March 18, 1996, was a violation of Section 8(a)(1) and (3) of the Act. Further evidence that Newbrough was fired and didn't quit is the fact that the union filed a charge claiming he was unlawfully terminated on March 25, 1996, which was the same day that the Union filed a charge claiming that Pete Wodzinski had also been unlawfully terminated. If Newbrough had quit why file the charge and why write a letter saying he was available to return to work.

On March 25, 1996, Union Business Representative Kenneth Perdue and Union Organizer Matthew Oaks went to Respondent's facility and presented a demand for recognition from the Garners.

On April 11, 1996, Kenneth Perdue and Matthew Oaks returned to Respondent's facility again and spoke with Jim Garner, who complained about the difficulty he was having getting qualified help and Oaks said why not bring back Newbrough and Wodzinski and Jim Garner said he didn't appreciate the union's mafia tactics and wouldn't rehire Newbrough and Wodzinski because they filed charges with the Board. Accordingly, the failure to recall Newbrough and Wodzinski since March 25, 1996, was a violation of Section 8(a)(4) of the Act because it was done to retaliate against them because charges had been filed on their behalf with the Labor Board.

E. Layoff/Discharge of Pete Wodzinski

Pete Wodzinski began his employment with Respondent some 8 years before he was terminated on March 20, 1996. At the time he was terminated he was the senior employee in terms of seniority working for Respondent. The Garners concede that Wodzinski was a very good worker with no discipline on his record and good attendance. In December 1995 just 3 months before he was terminated, Wodzinski received an unprecedented $500 Christmas bonus. There is no evidence any employee received as big a Christmas bonus as Pete Wodzinski.

Wodzinski and his helper, Paul Williams, signed union authorization cards on October 26, 1995. Wodzinski thereafter discussed the Union at the shop and at jobsites.

Wodzinski also attended the December 6, 1995 meeting at which Jim Garner, after telling the employees the Company had had its best year ever, told the employees he was thinking of taking away their vacation and holiday benefits because of their

[1] When told of the new policy some days earlier Newbrough, a smoker, who didn't like the new rule, commented that at least he didn't chew tobacco, like Jim Garner, and spit in the company vehicles.

bad attitude. When Rod Garner said with these benefits we may as well be union he heard Jim Garner say that he had been union before and would close before he would go union and he and his son would put on tool belts and do the work themselves.

On March 18, 1996, Wodzinski heard that Newbrough had been laid off. On March 19, 1996, Wodzinski met with Jim Garner, who said when Wodzinski asked why did we lose benefits if we had such a good year, that if attitudes improve then the employees would get their benefits back, and Garner also said Respondent had work that it could do but won't do it till the attitude of the employees changed. It is obvious that the so-called "attitude" problem was the interest of the employees in a union.

On March 20, 1996, Wodzinski and Jim Garner spoke again and afterwards when Wodzinski finished a task and went to see about more work he was told by the secretary that there was no more work for him to do and he could go home. Wodzinski saw Rod Garner as he was leaving and was told by Rod Garner at that time to turn in his uniforms. Wodzinski turned in his uniforms. He received no call to return to work.

Respondent claims that on March 20, 1996, Wodzinski told the Garners that he was going to take another job and gave them 4 weeks notice. The Garners claim that they talked Wodzinski out of quitting the year before and decided at that time that if he gave notice again they would let him go and not try to talk him out of it. They claim they told Wodzinski they would give him some work during the next few weeks but things were slow and they did not need him. Wodzinski credibly denied that he gave notice to the Garners that he was quitting.

The layoff of Pete Wodzinski on March 20, 1996, was a violation of Section 8(a)(1) and (3) of the Act.

On May 6, 1996, Wodzinski wrote a letter to Respondent saying he was still available for work but Respondent did not recall him. As noted above Jim Garner told Union Officials, Matthew Oaks and Kenneth Perdue, when Oaks suggested bringing Newbrough and Wodzinski back to work after Garner said he couldn't get qualified help that Newbrough and Wodzinski would not be brought back to work because they had filed charges with the Board. Accordingly, the failure to recall Wodzinski, like the failure to call Newbrough, since March 25, 1996, was a violation of Section 8(a)(4) of the Act.

F. Unlawful Interrogation

A day or two after Mark Newbrough was laid off on March 18, 1996, George (Mike) McCormack attended a meeting with the Garners and was told by Jim Garner that Mark Newbrough was let go because of his attitude and if his attitude changed he'd be rehired and further that Respondent had work to do but wouldn't do it until the attitude of the employees improved.

On March 22, 1996, George (Mike) McCormack met again with the Garners. At this meeting Jim Garner asked McCormack what, if anything, he knew about the union. McCormack evaded answering the question other than to say that a female union organizer had approached him about signing a union authorization card. This questioning of McCormack by Jim Garner constituted unlawful interrogation in violation of Section 8(a)(1) of the Act.

It also is of significance because it indicates that Respondent was aware of union organizing prior to March 25, 1996, the day the union first demanded recognition and the day Respondent claims it first heard of the union organizing effort.

On March 29, 1996, McCormack had a conversation with Rod Garner and Garner told McCormack that Respondent had work it could do but it wasn't going to do it until Respondent saw what was going to happen with the union.

In May 1996, Edward Jay Lane was hired by Respondent. Lane quit within a few months. Prior to being hired Lane was interviewed by Rod Garner on May 8, 1996. During the interview Rod Garner asked Lane what his views were about unions. At a second interview with Rod and Jim Garner, Jim Garner told Lane that if the Union got in he would shut down the Company. These statements to Lane constitutes unlawful interrogation and unlawful threats in violation of Section 8(a)(1) of the Act. In addition, and as noted above, Jim Garner told Lane that Respondent had a problem with the Union since the prior October indicating along with other evidence that Respondent was well aware of union activity among its employees when it unlawfully laid off Newbrough and Wodzinski and failed to recall Ware.

G. Unlawful Surveillance

On June 12 and 18, 1996, it is alleged that Respondent unlawfully surveilled or spied on the protected activity of its employees in violation of Section 8(a)(1) of the Act.

On June 12, 1996, Union Organizer Mitchell Walter visited one of Respondent's jobsites and was talking to employee Edward Jay Lane and one other unidentified employee trying to get them to sign union authorization cards. The two employees were sitting in a company truck eating lunch and were on their lunchbreak. Rod Garner started taking pictures of the three men with his camera. Rod Garner moments later spoke with Organizer Walter and asked him to stop harassing Respondent's employees and trying to ruin his Company. Walter explained he was trying to organize Respondent not ruin it. Respondent did file a charge with the Board alleging that the Union was harassing its employees but the charge was later withdrawn by the Respondent.

On June 18, 1996, when picketing was going on at Respondent's facility Pete Wodzinski showed up and Rod Garner took some pictures of the people picketing apparently including Pete Wodzinski. Wodzinski was an employee within the meaning of the Act because he had been unlawfully laid off and Respondent had unlawfully refused to recall him to work.

It is my opinion that what occurred on both June 12 and 18, 1996, were violations of the Act. When you picket in front of a facility you can anticipate obviously that management will observe you but for management to make a record by photographing what they have a right to look at is an unfair labor practice because, absent proper justification, photographing employees engaged in protected activity has a tendency to intimidate and plant a fear of reprisal. See *F. W. Woolworth Co*., 310 NLRB 1197 (1993). Respondent alleged that the Union was harassing its employees but no evidence was submitted to support this.

What occurred on June 12, 1996, was likewise unlawful surveillance in violation of Section 8(a)(1) of the Act. Employees have a right, when on their lunchbreak at a jobsite, to discuss the union and whether they should support it with their fellow employees as well with union organizer. An employee can't make an intelligent decision as to whether to support a union or not if he or she can't even talk about the union with a union representative. Clearly the boss showing up with a camera and taking picture of the employee and the organizer would tend to

interfere with protected rights which include, at a minimum, the right to listen to a union organizer's arguments in favor of the union when the employee is on his own time.

H. Bargaining Order

I will not recommend to the Board that a bargaining order issue in this case. The Union filed an election petition with the Board but it was blocked by the unfair labor practice charges filed by the Union. No election was ever held.

I note that the Union Respondent demonstrated with a card showing that it enjoyed majority support in the unit, i.e., six of eight people in the unit signed union authorization cards. Two of the six are no longer with Respondent, i.e., Paul Williams was legally laid off and George (Mike) McCormack quit and relocated to Oklahoma.

Clearly Respondent committed serious hall mark violations of the Act to include termination of employment of key union supporters and threats to lay off all employees before it would go union but there is insufficient evidence, in my opinion, to show that a fair election is impossible or even very remote. I conclude that once Newbrough, Wodzinski, and Ware are reinstated with backpay and an appropriate notice posted for 60 days that a fair election could be held among Respondent's employees. Once Respondent's serious unfair labor practices are remedied a fair election could be held and therefore a *Gissel* bargaining order is not necessary as a remedy in this case.

REMEDY

The remedy in this case should include a cease-and-desist order, the posting of an appropriate notice, the offering of reinstatement and backpay to Mark Newbrough, Pete Wodzinski, and Jason Scott Ware, and restoration of vacation and holiday benefits as they existed prior to January 1996 and backpay to employees because of the unlawful termination of those benefits. There should be backpay for Newbrough and Wodzinski running from the date of their unlawful layoff, i.e., March 18 and 20, 1996, respectively. Because Respondent had work to do and didn't do it at least from March 1996 backpay should be paid to Ware from mid-March 1996. I note that Respondent actually hired installers on April 24 and May 15, 1996, and hired helpers on April 24, May 17, and June 10 and 12, 1996. Again, Newbrough and Wodzinski were installers and Ware was a helper.

CONCLUSIONS OF LAW

1. Climatrol, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Sheet Metal Workers International Association Local Union No. 33 of Northern Ohio, AFL–CIO, the Union, is a labor organization with in the meaning of Section 2(5) of the Act.
3. Respondent on March 18 and 20, 1996, violated Section 8(a)(1) and (3) of the Act when it laid off Mark Newbrough and Pete Wodzinski because of their support for the Union and since mid-March 1996 when it failed to recall from layoff Jason Scott Ware.
4. Respondent since March 25, 1996, violated Section 8(a)(1) and (4) of the Act when it failed to recall Mark Newbrough and Pete Wodzinski because charges had been filed on their behalf with the Board.
5. Respondent violated Section 8(a)(1) of the Act when it threatened to terminate the employment of its employees before it would recognize a union as collective-bargaining representative of its employees.
6. Respondent violated Section 8(a)(1) of the Act when threatened to terminate benefits because of prounion activity of its employees and violated Section 8(a)(1) and (3) of the Act when in January 1996 it terminated vacation pay and holiday pay for its employees.
7. Respondent violated Section 8(a)(1) of the Act when it unlawfully interrogated employees about the union.
8. Respondent violated Section 8(a)(1) of the Act when it unlawfully surveilled and photographed the protected concerted activities of its employees.
9. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]